MALAYSIAN REPORTS

GLOBUS SHIPPING & TRADING CO. (PTE) LTD. v. TAIPING TEXTILES BERHAD

[F.C. (Gill C.J. (Malaya), Ali and Raja Azlan Shah F.JJ.) June 10, 1976]

[Penang — Federal Court Civil Appeal No. 152 of 1975]

Practice and Procedure — Jurisdiction — Bill of lading providing that dispute to be decided in country where carrier has principal place of business — Discretion of court.

Conflict of Laws — Jurisdiction — Choice of — Discretion of court.

The appellants were the defendants in an action brought by the plaintiffs—respondents in the Magistrate's Court at Penang. The plaintiffs' claim was for damages for breach of contract by the defendants as carriers for reward of a cargo of cotton from Karachi to Penang by their vessel. The bill of lading provided that any dispute arising under it shall be decided in the country where the carrier has his principal place of business. The principal place of business of the defendants, the carriers, was in Singapore. The learned magistrate had dismissed the claim as he held he had no jurisdiction to determine the claim. On appeal, Arulanandom J. held that this was a proper case where the discretion of the court should have been exercised in favour of the plaintiffs. The appellants appealed to the Federal Court.

Held, dismissing the appeal: (1) it would seem abundantly clear from the authorities that where a cause of action in respect of any dispute in relation to a contract arises and is therefore properly within its jurisdiction, the court has a discretion whether or not to adjudicate upon the claim in the action even where the parties have agreed to refer such dispute to a foreign court and that the question of the proper law of jurisdiction is quite separate from the question of the proper law of contract to be applied;

(2) in this case the learned judge had exercised his discretion in accordance with the established and recognised principles.

Cases referred to:—

(1) *Azimullah* v. *Master of S.S. "Halldor" & Ors.* [1965] 1 M.L.J. 248.

(2) *The Fehmarn* [1957] 2 All E.R. 707.

(3) *Evans Marshall & Co. Ltd.* v. *Bertola S.A. & Anor.* [1973] 1 All E.R. 992.

(4) *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd. (in liquidation)* [1939] 1 All E.R. 513.

(5) *Tzortzis & Anor.* v. *Monark Line A/B* [1968] 1 W.L.R. 406.

(6) *Compagnie Tvisienne de Navigation S.A.* v. *Compagnie D' Armement Maritime S.A.* [1969] 1 W.L.R. 1338.

(7) *The Fehmarn* [1958] 1 All E.R. 333, 335.

(8) *The Eleftheria* [1970] P. 94, 99; [1969] 2 All E.R. 641, 645.

FEDERAL COURT.

V. Thevendran for the appellants.

Charles Ong for the respondents.

Gill C.J. (Malaya) (delivering the judgment of the Court): The appellants, Globus Shipping & Trading Company (Pte.) Limited, were defendants in an action against them by the respondents, Taiping Textiles Berhad, as plaintiffs in the Magistrate's Court at Penang. The action was dismissed on the ground that the court had no jurisdiction to adjudicate on the plaintiffs' claim. The plaintiffs appealed to the High Court. Arulanandom J. allowed the appeal, setting aside the Magistrate's decision and remitting the case for trial. The defendants then appealed to this court. We dismissed the appeal and now state our reasons.

The plaintiffs' claim in the action was for a sum of $1,076.58 as damages for breach of contract by the defendants as carriers for reward of a cargo of cotton from Karachi to Penang by their vessel known as "Cherry Venture". The contract was contained in a bill of lading dated November 20, 1972 whereby the defendants acknowledged the shipment on board their vessel in apparent good order and condition 508 bales of Pakistan Raw Cotton for carriage to and delivery at Penang to the plaintiffs for an agreed freight. When the cargo was duly delivered to them as indorsees of the bill of lading, the plaintiffs found that there was a net shortage of 750.96 lbs of cotton from 7 bales, that 997.00 lbs of cotton were badly dirt stained and slightly wet and that 4 bales of cotton were short landed.

It was in respect of those shortages and the damage to the cotton that they brought the action for damages in the Magistrate's Court at Penang. Clause 3 of the Bill of Lading provided as follows:

"Any dispute arising under the Bill of Lading shall be decided in the country where the carrier has his principal place of business and the law of such country shall apply."

The defendants' principal place of business is in Singapore, but they have Hai Thong Shipping Co. of 127 Penang Street, Penang as their agents in Penang. The plaintiffs' principal place of business is in Kuala Lumpur but they have forwarding agents to act for them in Penang.

At the trial of the action before the learned Magistrate counsel for the defendants took the preliminary objection, which was also one of the defences raised, that by reason of clause 3 of the bill of lading the court had no jurisdiction to hear the case, citing the Singapore case of *Azimullah* v. *Master of S.S. "Halldor" & Ors.*[1] as the authority for such objection. Counsel for the plaintiffs, on the other hand, submitted that the court had jurisdiction to determine the claim on the ground that although the plaintiffs were in Kuala Lumpur they had forwarding agents in Penang. As authority for his proposition he cited the case of *The Fehmarn.*[2]

Having heard those arguments on the preliminary objection and taken a few days to consider the matter, the learned Magistrate gave a decision that in his opinion the court had no jurisdiction to determine the plaintiffs' claim. Accordingly, he made an order striking out the claim with costs. However, in his grounds of judgment, which he wrote subsequently, he stated that in striking out the claim the court exercised its jurisdiction in favour of the defendants and gave effect to the jurisdiction clause in the contract. He arrived at that conclusion in his grounds of judgment after stating therein the facts of the two cases which were cited to him and after referring to what Choor Singh J. said in the *Azimullah case,*[1] namely, that the question of jurisdiction in a dispute of this nature is a matter which is entirely in the discretion of the court which is called upon to decide the dispute.

The submissions at the hearing of the appeal in the High Court before Arulanandom J. were very brief, and his Lordship had no hesitation in allowing the appeal rightaway. As he stated in his grounds

of judgment, while the learned Magistrate had said that he exercised his discretion, there was nothing to indicate why the discretion was exercised in favour of the defendants, apart from the fact that the plaintiffs had their principal place of business in Kuala Lumpur and the defendants in Singapore.

In allowing the appeal the learned judge, having considered the two cases which were cited in the Magistrate's court and the case of *Evans Marshall & Co. Ltd.* v. *Bertola S.A. & Anor.*[3] as authorities for the proposition that in all such disputes the court has a discretion as to whether or not to assume jurisdiction, took the view that, considering the general principles enumerated in those cases and applying them to the facts of the present case, the decision of the learned Magistrate could not be upheld.

In the opinion of the learned judge this was a proper case where the discretion should have been exercised in favour of the plaintiffs for the reasons which are set out in his grounds of judgment as follows: —

"Service was effected in accordance with the rules of the court and the defendants through their Solicitors filed their defence submitting to jurisdiction albeit they raised the defence of jurisdiction in their pleading. The action was filed two days prior to the claim being statute barred. If the claim were dismissed, the plaintiffs will have no further remedy. No proceedings have been commenced in Singapore. All the plaintiffs' witnesses are in Penang. The goods were shipped from Karachi and if the defendants need witnesses from Karachi it would be just as simple or just as difficult to get them from Karachi to Singapore as from Karachi to Penang. The laws of Singapore are not dissimilar to the laws of Penang. To dismiss the claim for want of jurisdiction would not only be unfair to the plaintiffs but would give the defendant an advantage which he does not merit considering the facts of this case. If at all the law applicable to this case is different in Singapore, it would not be difficult to bring an expert witness from Singapore to testify in this court."

The main ground in support of the appeal to this court was that the learned appellate judge was wrong in law in interfering with the judicial discretion exercised by the learned trial Magistrate, whereby the learned trial Magistrate had held that the court had no jurisdiction in determining the respondents' claim. The true position would appear to be that the learned Magistrate himself took the view, when he came to write his grounds of judgment, that he was not quite right when he held that the court had no jurisdiction to determine the claim because he veered round to the view that it was a matter of discretion for the court. such discretion of course to be exercised on recognized principles.

Counsel for the appellants cited to us the cases of *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd. (In Liquidation),*[4] *Tzortzis & Anor.* v. *Monark Line A/B*[5] and *Compagnie Tuisienne de Navigation S.A.* v. *Compagnie D'Armement Maritime S.A.*[6] for his contention that where there is a clause such as clause 3 in the bill of lading in this case, the court should give effect to it. With respect to learned counsel, those cases do not support any such contention as they do not relate to the jurisdiction clause in a contract but to the clause as to the proper law of the contract.

As regards the general principles in relation to jurisdiction where parties have agreed to submit exclusively to a foreign jurisdiction, in the case of *The Fehmarn*[2] Wilmer J. said at page 710:

"Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that that agreement should be over-ridden and that proceedings in this country should be allowed to continue. However, in the end it is, and must necessarily be, a matter for the discretion of the court, having regard to all the circumstances of the particular case."

In the same case when it went up to the Court of Appeal[7] Lord Denning said:

"The next question is whether the action ought to be stayed because of the provision in the bill of lading that all disputes are to be judged by the Russian courts. I do not regard this provision as equal to an arbitration clause, but I do say that the English courts are in charge of their own proceedings: and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the over-riding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them."

The above case was followed in the Singapore case of *Azimullah.*[1] In the case of *Evans Marshall & Co. Ltd.* v. *Bertola S.A.*[3] the parties had agreed to the exclusive jurisdiction of the Spanish courts. The plaintiff brought an action in England and asked for leave to serve the writ out of jurisdiction. Leave was granted for the following reasons:

"On the assumption that cl 15 of the agreement was to be treated as an exclusive jurisdiction clause, leave should nevertheless be given to serve the writs on Bertola out of the jurisdiction under RSC Ord 11 since there were exceptional circumstances justifying such a course: (a) the substance of the case concerned the marketing of sherry in the United Kingdom; (b) all the essential witnesses were within the jurisdiction; (c) Bertola were a proper and necessary party, within RSC Ord 11, r. 1(j), to the plaintiffs' proceedings against ISI, which had nothing to do with the Barcelona Court, a state of affairs which had been brought about by Bertola's own actions in purporting to terminate the agency agreement and to appoint ISI instead; (d) the evidence disclosed that the relevant Spanish law did not differ from English law to any substantial extent. Accordingly it would, in all the circumstances, be unjust to allow Bertola to terminate the plaintiffs' agency in the United Kingdom and at the same time avoid the jurisdiction of the English courts."

On the question of whether or not the court should exercise its jurisdiction in cases where the parties have agreed to refer any disputes to a foreign court, Brandon J. in *The Eleftheria*[8] said:

"The principles established by the authorities can, I think, be summarised as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise may properly be regarded: — (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court

because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial" (See also Halsbury's Laws of England, 4th Edition, Volume I, page 281, para. 440).

It would seem abundantly clear from the authorities that where a cause of action in respect of any dispute in relation to a contract arises and is therefore properly within its jurisdiction, the court has a discretion whether or not to adjudicate upon the claim in the action even where the parties have agreed to refer such dispute to a foreign court, and that the question of jurisdiction is quite separate from the question of the proper law of the contract to be applied. From the reasons given by the learned judge in allowing the appeal in the present case it was clear that he had exercised his discretion in accordance with the well-established and recognized principles. We were therefore satisfied that he was right in allowing the appeal.

For the reasons stated we dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Jayaraman & Ong.*

ANDREW s/o THAMBOOSAMY v. SUPERINTENDENT OF PUDU PRISONS, KUALA LUMPUR

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) June 12, 1976]

[Kuala Lumpur — Federal Court Criminal Appeal No. 5 of 1976]

Administrative Law — Habeas corpus — Person detained under Immigration Ordinance — Arrangements for his removal not made because of non-cooperation of person detained — Whether detention unlawful — Whether there is right to be heard before making of order of detention — Service of detention order — Inability of authorities to remove the appellant from the Federation — Whether he may be released on bail — Immigration Ordinance, 1959, ss. 6(1)(c), 34(1) and 56(2) — Criminal Procedure Code (F.M.S. Cap. 6), s. 365.

Bail — Person detained under Immigration Ordinance.

The appellant had renounced his citizenship and had returned to India. Subsequently he re-entered the Federation and he was detained under section 34(1) of the Immigration Ordinance, 1959, so that arrangements could be made for his removal. The appellant refused to co-operate with the authorities to enable travel documents to be issued to him and therefore he could not be deported. He applied for an order of *habeas corpus*, claiming that his detention was illegal or improper. His application was dismissed in the High Court and he appealed to the Federal Court.

Held, dismissing the appeal: (1) as the Immigration Ordinance did not give a right to a hearing before an order of detention is issued, the appellant had no such right, implied or otherwise;

(2) as the Ordinance did not require the order of detention to be served on the appellant, it need not have been served as a matter of law. In this case however there was evidence that it was served on the appellant;

(3) the appellant was lawfully detained in this case and the fact that the authorities were unable to remove the appellant from the Federation did not make the detention illegal or unlawful;

(4) the court had no power under section 365 of the Criminal Procedure Code to give bail, to the appellant.

Cases referred to:—

(1) *Lui Ah Yong alias Loi Tuan New* v. *Superintendent of Prisons, Penang.* Penang Originating Motion No. 22 of 1975 (unreported).

(2) *Ceylon University* v. *Fernando* [1960] 1 W.L.R. 223.

(3) *Durayappah* v. *Fernando* [1967] 2 A.C. 337.

(4) *Zainab binti Othman* v. *Superintendent of Prison, Pulau Jerejah, Penang* [1975] 2 M.L.J. 221.

(5) *Karam Singh* v. *Minister of Home Affairs* [1969] 2 M.L.J. 129.

FEDERAL COURT.

Lawrence Tan for the appellant.

Haji Abdullah Ngah (Deputy Public Prosecutor) for the respondent.

Suffian L.P. (delivering the judgment of the Court): The issues in this appeal are:

(1) was and is the appellant illegally or improperly detained, and

(2) if he was and is, has the court power to release him on bail?

The appellant, born in Kuala Lumpur on February 27, 1939, was a Malaysian citizen. On February 5, 1969, he voluntarily renounced his Malaysian citizenship. The renunciation was registered by the Registrar-General of Citizenship on February 28. The appellant was informed of the registration on March 6. He had surrendered his national registration identity card for which a receipt dated February 25 was issued. As a result of his renunciation he ceased to be a citizen by virtue of article 23(1) of the Federal Constitution which reads: —

"23(1) Any citizen of or over the age of twenty-one years and of sound mind who is also or is about to become a citizen of another country may renounce his citizenship of the Federation by declaration registered by the Federal Government, and shall thereupon cease to be a citizen."

Following the renunciation, the appellant on March 24 applied to the Immigration Department for a certificate of identity to enable him to make a one-way trip to India. On April 17, he was granted a certificate of identity.

On July 22, he applied for the withdrawal of his E.P.F. contribution on the ground that he was leaving Malaysia in order to settle in India permanently. In support of his application the appellant told the Manager, E.P.F., Petaling Jaya, that he would be leaving Malaysia for India on August 5 by S.S. Rajula. His application was approved and he withdrew his E.P.F. money on August 4.

But in the meantime, on January 31 he had applied for a Malaysian passport. It was granted to him on the following day, that is 4 days before he renounced his citizenship. In his application for the passport he said that he wanted it so that he could make a social visit to India.

In August 1969, the appellant left Penang by boat for India.

He did not however stay long there, for in February 1970, he returned to Malaysia by air through Subang airport by making use of the Malaysian passport. As a non-Malaysian he should have had, but did not have, a Pass to enter the country as required